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June 16, 2009

*MEMBER OF CA AND NV BARS

VIA E-FILING

Office of the Executive Secretary National Labor Relations Board 1099 14th Street, N.W. Washington, D.C. 20570-0001

Re:

Laborers' International Union of North America, Local 1184 (Ames Construction, Inc.) – Case No. 21-CD-00674 POST-HEARING BRIEF OF LABOR ORGANIZATION

Laborers' International Union of North America, Local 1184 ("Local 1184") herewith submits its post-hearing brief. In discussing the evidence given at the hearing on May 13th, 2009 we will follow the analytical path the Board has followed in prior decisions construing Section 10(k). *See, Laborers' Local 1184 (Golden State Boring & Pipejacking, Inc.)*, 337 NLRB No. 25 (2001) (hereinafter "Golden State").

- 1. <u>Jurisdiction</u>. It was stipulated that the Employer, Ames Construction, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act; that Teamsters Local 166 ("Teamsters' or Local 166") and Local 1184 are labor organizations within the meaning of Section 2(5) of the Act. (Board Exhibit 2, paragraphs 3 and 4.)
- 2. <u>The Disputed Work</u>. The work that is the focus of this dispute involves "(a)ll truck drivers, including, but not limited to, the operation of belly trucks and water trucks at the Drop 2 Storage Reservoir, Canal and Structure Project, located along Interstate Highway 8 in Imperial County, California." (Board Exhibit 2, paragraph 5)

From the inception of this project, the Employer has continuously employed members of Local 1184 to operate these vehicles on the jobsite. Following is the relevant testimony.

Terry Brennan, Ames's Regional Construction Manager for the past ten years, testified that his region is California, Arizona and parts of New Mexico and Nevada. Ames has operations in some 3 other states as well. It is a general contractor doing heavy highway and industrial work. (Tr.18)¹

¹ "Tr." means the transcript of the hearing on May 13, 2009.

Ames has been constructing the Drop 2 Reservoir in Imperial County for the U.S. Bureau of Reclamation since October 2008. The work consists of moving seven million tons of earth, lining six miles of concrete channel, and installing a 490-acre reservoir with appropriate appurtenances. (Tr. 19)

Ames's subcontractors Coffman Specialties and International Lining are doing some of the work alongside its own employees who are Laborers, Operators and Carpenters. Ames employs no Teamsters on this work. (Tr. 20)

The driving work involves operating belly trucks that haul dirt, water trucks which suppress dust and condition soil, and mixer trucks providing slurry to a 108 inch pipe. All of these vehicles are operated by members of Laborers' Local 1184. Ames assigns them this work because of its preference to have them do the driving. It is more efficient to run the job this way since, in the event of breakdowns or if not all of the vehicle are needed, the drivers can also do laborers' work and therefore keep busy during the workday. (Tr. 21-22)

This has been Ames's consistent pattern in this vicinity. On their earlier job, a short distance away, they had signed an agreement with the Laborers' literally "across the street" (Tr. 25) and thereafter simply continued assigning work as before.

The only claim the Teamsters have put forth to claim this work is their highly deceptive practice of foisting off on the unsuspecting Regional Construction Manager a Short Form Agreement the company intended to apply only to a single project in San Bernardino County. It is clear from Brennan's testimony and that of John Ames that the company never consciously intended to assign the work it had on the canal to the Teamsters. In fact, the only objective it actually carried forward was its Agreement with Laborers' Local 1184 executed on the occasion of the first of the two All American Canal projects, Joint Exhibit ("JX") 1. (Tr. 25-26)

At no time has Ames ever assigned driving work in the area of the All American Canal to the Teamsters. (Tr. 37) Rather it has acted consistently with its contractual obligations to Local 1184 as demonstrated by the following agreements:

• Laborers' Short-Form Agreement for the Construction Industry, entered into in June of 2007, (JX 1). This agreement binds the Employer to the Southern California Master Labor Agreement between Southern California General Contractors and the Southern California District Council of Laborers, 2006 - 2009, on behalf of its affiliated Local Unions ("MLA").

- Addendum to Agreement between Ames Construction Inc, and Southern California District Council of Laborers and its affiliated Local Union 1184, dated June 4 and 5, 2007, the last two pages of JX 1. In paragraph 1 of this Addendum, the Employer agrees to employ personnel "which the Employer has previously designated as the craft of Cement Mason, Pipefitter, and Teamster." The paragraph further states that Ames has previously had no collective bargaining agreement with any union covering these employees and recognizes Local 1184 as their exclusive bargaining representative. The Addendum binds the Employer to pay wages and fringes in accordance with the MLA.
- Amendment to Addendum "for work performed on the Drop 2 Reservoir Project" dated January 26, 2009, JX 24. This document sets wage and fringe amounts on this specific project for the "work previously designated as the craft of Teamster."
- 3. The Current Dispute. Notwithstanding the clear contractual undertakings described above and the consistent uninterrupted work assignments, in or about late February of 2009, Local 1184 learned that Teamsters Local 166 was demanding that the driving work be assigned to members of that Union.² On February 25, 2009, Business Agent Michael Dea wrote to Ames demanding that the work not be reassigned as requested by the Teamsters. (JX 2)
- 4. <u>No Other Procedure Exists To Resolve This Dispute</u>. The parties all stipulated at the hearing that there is no voluntary dispute resolution procedure to resolve the question, absent voluntary withdrawal of its claim by the Teamsters Union. (Tr. 9)
- 5. The Employer Has Properly Assigned The Work At Issue To Local 1184 Members; The Board Should So Find And Determine That Ames Employees Represented By Local 1184 Are Entitled To Perform That Work. Using the factors the Board has established to determine such disputes, the resolution is clear: this is Laborers' work and has been, since at least 2007. In fact, the work associated with the All American Canal has never been performed at any time by Teamsters. (Tr. 26) ³

Although Local 166 directed a letter requesting a pre-job conference to Ames on November 7, 2008 (JX 15), it did not institute its blitzkrieg of demands (JX 10-18) until the following February, after the work had been assigned to and was being performed by Laborers.

Teamster Representative Michael Kling testified he made no claim for the driving work on the Canal because, after visiting the job (Tr. 120), he said there were "no Laborers . . . driving any sort of trucks that was out of line on that project." (Tr. 121) He appears to have been wrong on the facts.

a. The Collective Bargaining Agreements: The Short form, the MLA, the Addendum to the Short Form and its subsequent amendment establish that the Employer has intentionally and unmistakably granted this jurisdiction to Local 1184 members and did so in paragraph 1 of the Addendum almost two years ago. Earlier this year, it set specific wage and fringe amounts on the Drop 2 Storage Reservoir work. (JX 24) Whether the Employer has any extant agreement of any kind with the Teamsters (a contention that is hotly disputed between them), even so the exactitude of the agreements with Local 1184 would have to take precedence over any more general undertaking. JX 1 and 24 leave no room for doubt on the point.

In contrast, Local 166 had an agreement with Ames for work performed in the Cajon Pass area of San Bernardino County, a project that Ames thought called for only a project specific agreement. The significance the Teamsters placed on that document was lost on Ames: the company had "never dealt with the unions in California." (Tr. 69) John Ames, Senior Vice President, testified that, concerning the Cajon job, the Company met with all trades "Teamsters, Laborers, Cement, Carpenters. . . (w)e told them at that time that we were going to sign the job agreement . . . we just wanted to sign a project agreement with all of the Unions – we just wanted a job agreement for that particular job, because we had no other job." (Tr. 70) Ames also said "Everyone told us they would give us a job agreement." (*Ibid*) But, as it turned out, even if Local 166 said that, its spokespersons didn't mean it.

- b. <u>Employer's Preference</u>: Ames's Regional Manager has, honoring its contractual commitments, testified that it prefers to have matters continue as they are, assigning the work to Local 1184 members. (Tr. 22, 29-30) The main reason is one of efficiency: Ames assigns them this work because of its preference to have them do the driving. It is more efficient to run the job this way since, in the event of breakdowns or if not all of the vehicle are needed, the drivers can also do laborers' work and therefore keep busy during the workday. (Tr. 21-22) The other work on the project is clearly laborer's work, such as the "7 million cubic yards of earth to move . . . six miles of lined concrete channel . . . a 490-acre reservoir (Tr. 19) and 15,000 yards of structural concrete. (Tr. 29) This is all Laborers' work. *See*, for example, JX 21, the State Wage Determination on the Drop 2 job, at pp. 15 17, listing the Laborer Classifications. By no stretch of anyone's imagination is this the work of a Teamster, not even the "working teamster" referred to in Mr. Kling's testimony.
- c. <u>Employer's Past Practice</u>: Local 1184 Business Agent Mike Dea testified that within the past two years he has been on both job sites and witnessed his members driving 10 wheel, three axle, water trucks and eighteen wheel belly trucks. The operators of these vehicles were required to have Class A Drivers Licenses and did have them first on the earlier Canal project and later on

the Drop 2 Storage job. (Tr. 84-87 At the periodic request of Ames, Local 1184 has utilized the dispatch procedures set forth in Article III of the MLA to send qualified members to these job sites.(Tr. 87-88)

- d. <u>Relative Skills</u>: To perform this work, the vehicle operators must hold California Department of Motor Vehicles Class A Drivers Licenses. All of them do hold those licenses and in fact were trained in that skill by Local 1184 to be able to hold them. They are therefore fully competent to do this work. The relevant skills of the competing crafts are equal (*see* Tr. 65-66, Brennan so testifying).
- 6. <u>Economy And Efficiency Of Operations</u>: Clearly, the Employer has found this factor is best accommodated by adhering to the decisions made two years ago: the Laborers are on the job, they are competent and licensed to do the work, and there is no need to disrupt the completion of the project.

At the time of the hearing, Terry Brennan testified, the earth moving work had largely been finished. Their only involvement with Teamsters union representatives was a series of testy exchanges in February of this year, when they attempted to force the work away from the Laborers and then only after the Drop 2 project was well underway. (Tr. 32)⁴

The Teamsters' demand was made in the face of and despite the facts that:

- all driving work on the Ames jobs in the geographic jurisdiction of Local 1184 has been done by Laborers, as contracted for in the Short Form Agreement binding Ames to the Laborers' Master Labor Agreement ("MLA") (JX 1 and 8), and
- specific addenda and amendments were executed to tie down the nature of the work to be performed on these projects and the rates of pay and benefits, and
- the reasons these decisions were reached by Ames concerned its view of the efficient and orderly progress of the jobs.

Despite all of that evidence pointing in the opposite direction, the Teamsters illogically cling to the contention that the work assignments made between labor

The Teamsters wrote Ames a letter in November 2008 requesting a pre-job meeting, referencing a supposed meeting two days earlier, a recollection no other witness could confirm. (*See*, *e.g.*, Tr. 45). And, in any event, they did nothing further until three months later after the job had started and the work was being performed by the assigned Laborers.

organizations and the employer in a different geographical context and at a different time, nonetheless override such evidence and must result in a reversal of work assignments of at least two years standing. The contention is simply not tenable.

See, e.g., the testimony of John Ames, Senior Vice President of the company. He signed JX 24, the amendment to the Addendum to the Laborers' Short Form, the one that set the specific wage and fringes for the Drop 2 project. The contrast is stark: he was misled into signing an agreement on a project in another area at a time, as he testified, that the company had not done business in California before (Tr. 70), but was fully aware of the content of the agreement with Local 1184 and, most importantly, wanted to have that work done by those workmen and at those specific rates of pay. And he ruefully acknowledged his earlier mistake: "we said we would only sign a job agreement, but I apparently signed something else." (Tr. 72)

This is not to say that ignorance of contract terms is an argument for giving the work to the Laborers; it is, however, clear evidence of the Company's intent in each project as to whom it wished to do the work: it sought to assign several crafts work in Cajon Pass believing it was being done for a single project.⁵

7. <u>A True Iurisdictional Dispute Exists</u>. In her opening statement, Teamsters' counsel asserted that at stake is not a jurisdictional dispute but a work preservation issue between Ames and Local 166. The assertion is misplaced. In every particular, this is very much a case over jurisdiction: both Unions claim the right to operate the vehicles on the Drop 2 Project, both claim under short form adherences to Master Labor Agreements, (the Laborers in considerably more detail than just boilerplate). In this case then, Section 8(b)(4)(D) has been properly invoked. *Teamsters Local 839 (Shurtleff & Andrews Constructors)*, 249 NLRB 176 (1980).

Laborers' Local 1184 (Golden State Boring & Pipejacking, Inc.), 337 NLRB 157 (2001) is also directly on point; it even involves the very same LIUNA Local Union. The Board found for Local 1184, even as it should do so now. The relevant factors there were the collective bargaining agreements, the Employer's preference and the current assignment. They are all present in this case. The Board should award the work to Laborers' Local 1184.

And it may have been just that: a project agreement for the other Unions on that job. The only evidence in the record as to what the other crafts may have bound Ames to in Cajon pass was John Ames' statement that "(e)veryone told us they would give us a job agreement." (Tr. 70)

Conclusion

For the foregoing reasons, the Board should issue its Decision and Determination that the employees of Ames Construction represented by Laborers' International Union of North America, Local 1184, AFL-CIO are entitled to perform the work of truck driving, including, but not limited to, the operation of belly trucks and water trucks at the Drop 2 Storage Reservoir, Canal and Structure Project, located along Interstate Highway 8 in Imperial County, California.

Respectfully submitted,

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PROOF OF SERVICE

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-6268.

On June 16, 2009, I served the foregoing document described as POST-HEARING BRIEF OF LABOR ORGANIZATION on all interested parties in this action by:

See attached Service List.

[X] (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on June 16, 2009, at Los Angeles, California.

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